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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 309

CURTIS TAYLOR,

Petitioner,

v.

THE BALTIMORE & OHIO RAILROAD CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Curtis Taylor, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on April 2, 1965.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reported at 344 F. 2d 281.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on April 2, 1965, and copies thereof are appended to this petition in the appendix at volume II, 48a-49a. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

The crucial issue in this action, brought under the Federal Employers' Liability Act, was where this accident occurred. If it occurred on the gangplank, it would be considered to have occurred "upon the navigable waters" and, therefore, within the purview of the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. Sec. 930). Thus, no remedy would be available under the Federal Employers' Liability Act and plaintiff's suit would fail.

A crucial part of the defendant's proof on this issue consisted of a report prepared by an employee of the defendant railroad, and sent to the Department of Labor, pursuant to the provisions of the Longshoremen's Act (33 U. S. C. Sec. 930) for the purposes of identifying accidents covered under that Act. In effect, this report indicated that the accident occurred on the gangplank. The questions presented are:

(1) Whether it was prejudicial error to admit into evidence the defendant railroad's report to the Department of Labor, since this report does not fall within the business record exception found in the Federal Business Records Act (28 U. S. C. § 1732).

(2) Whether it was prejudicial error to admit into evidence the defendant railroad's report to the Department of Labor, since its admission is expressly forbidden under the provisions of the Longshoremen's Act (33 U. S. C. Sec. 930).

Statutes Involved

33 U. S. C. Sec. 930, The Longshoremen's Act, provides, in pertinent part, as follows:

"(a) Within ten days from the date of any injury or death or from the date that the employer has

knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address and business of the employer; (2) the name, address and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

* * * * * *

(c) Any report provided for in subdivision (a) or (b) of this section shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made."

Statement

The plaintiff, an employee of The Baltimore and Ohio Railroad Co., was injured while operating a tractor on pier 66, North River, New York, on the night of December 24, 1956. Suit was brought under the Federal Employers' Liability Act. The case was tried in the Eastern District of New York before District Court Judge Rosling and a jury. The jury returned a verdict for the defendant and a judgment was entered upon that verdict on February 20, 1963.

It was conceded at trial that, if the plaintiff's accident was covered by the Longshoremen's & Harbor Workers' Compensation Act, no remedy would be available under the Federal Employers' Liability Act and the plaintiff's suit must fail. It was also virtually conceded at trial that, if the accident of which the plaintiff complained occurred on a gangplank, it would be considered to have occurred "upon navigable waters" and, therefore, within the purview of the Longshoremen's Act.

In this posture of the case therefore, the critical issue at trial was where the accident occurred. And, in fact the trial judge charged that this issue was of "decisive significance" (25a) and, when the jury returned its verdict, it plainly indicated that it was based on having found "the plaintiff to have been on the gangplank" (62a).

The defendant's proof on the issue of where the accident happened consisted of a report made under the provisions of the Longshoremen's Act to the Secretary of Labor. This report of the accident which was introduced into evidence is entitled "U. S. Dept. of Labor, Bureau of Employees Compensation of the State of New York." (See Defendant's Exhibits EE & CC.*) The report was originally made by the defendant railroad and filed with the United States Department of Labor (113a). It is required to be made under the provisions of the Longshoremen's Act (28 U. S. C. Sec 930) for the purposes of identifying accidents covered under that Act (104a).

33 U. S. C. Sec. 930, The Longshoremen's Act, provides, in pertinent part, as follows:

> "(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address and business of the employer; (2) the name, address and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.
>
> * * * * * *

---

* CC is merely a carbon copy of EE (113a).

> (c) Any report provided for in subdivision (a) or (b) of this section shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made."

The Labor Department report in question contains the following description of the accident here at issue:

> "While Taylor was pulling a line of 6 empty trailer trucks up the plank onto float No. 1830 on the north side of Pier 66, North River, his tractor stalled halfway up."

The man who signed the report, Mr. Getty, was not produced at trial and, as the trial judge indicated in his charge, "what (Getty) knew about the content of this form, where he got the information from, the source, and so on, is not stated" (34a). The trial judge, nevertheless, admitted the form over the plaintiff's objection (131a) irrespective of the fact that the statute itself specifically excluded it from admission into evidence.

The decisive and highly prejudicial effect of this report on the jury was recognized by the trial judge. Responding to the plaintiff's motion to set aside the verdict, the trial judge indicated that the jury had, in effect, brought in a "special finding" that the accident occurred on the gangplank (135a). Furthermore, the trial judge indicated, the jury's request for exhibits also showed that the location of the accident was decisive to their verdict (135a).

It is also significant on the issue of prejudice to the plaintiff that the trial judge said (136a):

> "And the tragic part of it, in the Court's view, is that so far as negligence was concerned in this case, it was practically conceded by the defense when they put the operator of the tractor on, which was involved in the collision, and he confirmed the plaintiff's ver-

sion as to the accident itself, but the jury never reached a consideration of that."

The Court of Appeals affirmed the decision below, and thus created a situation which makes this case a peculiarly appropriate one for this Court to review by way of Writ of Certiorari.

Reasons for Granting the Writ

(1) The decision below should be reviewed because the Court of Appeals for the Second Circuit has misconstrued, misapplied and unduly restricted this Court's decision in *Palmer* v. *Hoffman* (318 U. S. 109), in such a way as not only to destroy the spirit in which it was advanced, but also to create a direct conflict with the decisions of the Court of Appeals in the Sixth and Ninth Circuits.

Slowly but surely the Second Circuit has distinguished and chiseled out exceptions to the *Palmer* decision, and while some of these may be wholly justifiable and in accord with its spirit, the Court no longer remembers, the pre-chiseled *Palmer,* or what it stood for, and in this vein it is of utmost importance, that this Court reassert the principles for which *Palmer* stands.

The reassertion is needed so as to once again establish uniformity between the decisions of the various circuits, as well as to establish guideposts to a problem that arises with great frequency in the trial courts of this country.

Very often the simplest propositions are the most easily misconstrued. In *Palmer,* this Court very simply and ably established that the statutory exception embodied in the Federal Business Records Act (28 U. S. C. § 1732) only applied to "records essential to (a business') efficient operation" (at p. 111) and that the railroad's record of how the accident happened, which was sought to be introduced, was "not for the systematic conduct of the enterprise as a railroad business" (at p. 114).

The motivation behind this holding undoubtedly concerns itself with the reliability of the information recorded. The Court feared that "regularity of preparation would become the test rather than the character of the records and their earmarks of reliability . . ." (at p. 114).

Various exceptions to the *Palmer* holding, based on circumstances evidencing a certain reliability to be attributed to the report in question, have been created by the Second Circuit. In *United States* v. *New York Foreign Trade Zone Operators* (304 F. 2d 792, 796), the accident report was admitted into evidence because it was not prepared for litigation but for the purpose of verifying the employee's workmen's compensation claim against the Government. And, in *Pekelis* v. *Transcontinental & Western Air, Inc.* (187 F. 2d 122), the accident report was admitted into evidence because it was against the interest of the entrant when made," and it was "not the entrant who . . . sought to introduce the reports" (at p. 130).

These earmarks of reliability are most certainly not present in the instant case. The report here, just like the report in *Palmer,* served the interest of the entrant when made, and unlike *Pekelis,* it is the entrant here who seeks to admit the reports. Furthermore, it is distinguishable from the *Foreign Trade Zone* case in that the report was here made for the purpose of future litigation.

The report in the instant case, lacking all earmarks of reliability, cried out for the simple application of the *Palmer* doctrine, and failing to do so, the Second Circuit, in addition to its misapplication of this Court's decision, brought the case into conflict with the recent decision of the Sixth Circuit in *Dilley* v. *Chesapeake & Ohio Railway Company* (327 F. 2d 249, 251 (6th Cir. 1964)). There, the Court applied a literal interpretation of the *Palmer* doctrine in holding inadmissible a company form accident report sought to be introduced by the plaintiff, whom the contents of the report favored. Even though the report was against the

interest of the entrant when made, the Court held it inadmissible simply because it was not in the regular course of the railroad's business to prepare accident reports.

Such a holding is not only in conflict with the decision in the instant case, but directly in opposition to the Second Circuit decision in the *Pekelis* case where the admissibility was based on the fact that the report was against the interest of the entrant when made and therefore achieved some measure of reliability that brought it within the business records exception.

There is yet a further area of conflict with decisions of other circuits. In your petitioner's brief, it was forcefully argued that another reason for excluding the report and for refusing to allow it to come in under the business record exception was that there was no indication that the information on which the report was founded was given in the regular course of business. (See, e.g., *United States* v. *Grayson,* 166 F. 2d 863, 868-869; *Shenker* v. *United States,* 322 F. 2d 622, 627.) In both the *Grayson* and *Shenker* cases, the Second Circuit excluded business records on the ground that the information contained in them came from persons who were not under a duty, in the regular course of business, to give such information.

In *Grayson,* Judge Learned Hand, writing for the court, said (166 F. 2d at p. 869):

> "In cases where an entrant records what he has heard, the document will be evidence of what they have told him only in case it appears that it was part of their regular course of business to report to him what the declarants themselves knew, and it was part of his business to record what they said. The statute did not mean to make competent whatever the entrant picked up from random sources, although it was part of his business to pick up information where and when he could and make a record of it. The 'act, transaction,

> occurrence or event' which the entrant records must be one of which he learns from a declarant who shall 'in the course of business transmit the information for inclusion in the memorandum.' 'Multiple hearsay' is no more competent now than single hearsay was before."

This same reasoning was also followed in the 1963 *Shenker* case before the Second Circuit. (See 322 F. 2d 622, 627, *supra*.) Furthermore, in the 1962 case of the *United States* v. *New York Foreign Trade Zone Operators* (304 F. 2d 792, 796), the Court expressly made note of the fact that "the entrant and the informants were under a duty to make the report," intimating that, had this not been so, the report would have been inadmissible.

The Court of Appeals in the instant case made no reference to this argument in its opinion and, therefore, it must be assumed that it was rejected *sub-silentio*. Such a rejection not only brings it in conflict with its own prior decisions, heretofore alluded to, but with the decision of the Ninth Circuit in *Standard Oil Co. of California* v. *Moore*, 251 F. 2d 188, where the court, in holding inadmissible certain reports, curiously enough, relied on the Second Circuit's decision in the *Grayson* case. The Court stated that "where the information comes to the entrant or maker from unauthorized persons, the memorandum or record is therefore inadmissible, not because it contains hearsay, but because it was not made in the regular course of business" (at p. 214). The reports were held inadmissible because "in few, if any, of these instances was any showing made that the person supplying such information to the writer was under a duty to do so.

In the instant case, the entrant was not produced and there was absolutely no indication as to where, or from whom, he obtained the information embodied in the report. The case is, therefore, in perfect apposition to the *Standard Oil* case.

The questions presented by this case are of great and recurring significance in light of the conflicts they create and the numerous instances in which they arise, and thus, after 22 years, when the inner workings of *Palmer* are beginning to rust, this case becomes a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

(2) The decision below should be reviewed because of the serious question involved in connection with the refusal of the Courts below to apply the exclusionary provision found in the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. Sec. 930(c)).

The report of accident introduced in this case was made under the provisions of 33 U. S. C. Sec. 930, set out verbatim, *infra*.

In short, the very Longshoremen's Act which required the defendant railroad to submit the report of accident, whose admissibility is in issue in this case, forbids its admission.

In *Palmer* v. *Hoffman*, this Court alluded to two statutes which have a provision similar to that found in Section 930(c) of the Longshoremen's Act. (See 318 U. S., at pp. 114-115.) Common carriers are required to file monthly reports of railroad accidents with the I. C. C. (See 45 U. S. C. Sec. 40), but the statute prohibits the admission of such reports in litigation arising out of the accidents. (See 45 U. S. C. Sec. 40.) A similar provision bars the use in litigation of reports concerning accidents resulting from the failure of a locomotive boiler. (See 45 U. S. C. Secs. 32, 33.) The Court characterized the two statutes as evidencing "an explicit congressional policy to rule out reports of accident . . ." (318 U. S. at p. 115) and implied that the policy is founded on the fact that the reports are unreliable because they are prepared with future litigation lurking in the background.

A second reason of policy behind the exclusionary provision of the Longshoremen's Act is the prejudicial effect on the jury of knowledge that the plaintiff, if denied common law recovery, will be awarded compensation payments. (Compare, *Eichel* v. *New York Central Railroad Co.*, 84 S. Ct. 316.) The likely prejudice and the difficulty of avoiding it which explain the exclusionary provision of Section 930 were well illustrated in the instant case, as a result of the Judge's charge on the statute.

The Congressional intent found in the Longshoremen's Act is clear and unambiguous. It is merely a legislative embodiment of the principles for which *Palmer* v. *Hoffman* stand. In short, Congress did not want these accident reports, which are subject to a great deal of unreliability to be admitted into evidence for any purpose whatsoever.

This Congressional intent has been thwarted in the instant case under the guise of holding that because plaintiff's counsel did not specifically object on the statutory ground, the Court was powerless to exclude the statement. Counsel for the plaintiff did, however, object on other specified grounds.

It has long been settled that a ". . . (specific) objection overruled will be effective, though naming an untenable ground, if there is *no purpose at all* for which the evidence could have been admissible." (1 *Wigmore, Evidence* § 18 at p. 342; cf. *Richardson on Evidence* (9th Ed.), Section 543, p. 561; *Presnell* v. *Garrison*, 121 N. C. 366, 28 S. E. 409.)

Certainly, the exclusionary provision of the Longshoremen's Act makes the report in the instant case inadmissible for any purpose whatsoever in judicial proceedings.

It is respectfully submitted that this Court should exercise its inherent power to see that Congressional Acts involving important public policy considerations are not denied application in appropriate cases.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATUTES

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Questions Presented

The questions set forth in the Petition (p. 2) might more properly be stated as follows:

1. Whether it was prejudicial error to admit into evidence the respondent's report of the accident to the Department of Labor, in view of the fact that the Longshoremen's and Harbor Workers' Compensation Act required that such a report be made promptly to such Department.

2. Whether it was prejudicial error to admit that report into evidence in view of the fact that (a) Section 930(c) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 930[c]) provides that such report "shall not be evidence of any fact stated in such report in any proceeding in

respect of such injury or death on account of which the report is made"; (b) the objection based upon this language of Section 930(c) of the Act was not raised at the trial; and (c) the Act did not prohibit the use for any purpose of the copy of the report, which was also admitted into evidence.

Statutes, Rule and Regulations Involved

In addition to the statutes quoted in the Petition (pp. 2-3),* the following statutes, rule and regulations are involved:

A. *Statutes*

(1) The Federal Business Records Act (28 U.S.C. § 1732) provides, in part, as follows:

> "§ 1732. Record made in regular course of business; photographic copies
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

* While petitioner refers to the Federal Business Records Act (28 U.S.C. § 1732) under the heading "Questions Presented", this Act is not quoted under "Statutes Involved".

(2) The New York Civil Practice Act, Section 374-a (in effect at the time of trial), similarly provided, in part, as follows:

> "§ 374-a. Admissibility of certain written records.
>
> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

(3) Section 929 of the Longshoremen's and Harbor Workers' Act (33 U. S. C., § 929) reads as follows:

> "Every employer shall keep a record in respect of any injury to an employee. Such record shall contain such information of disease, other disability, or death in respect of such injury as the Secretary may by regulation require, and shall be available to inspection by the Secretary or by any State authority at such times and under such conditions as the Secretary may by regulation prescribe."

(4) Section 930(e) of the same Act provides as follows:

> "Any employer who fails or refuses to send any report required of him by this section shall be subject to a civil penalty not to exceed $500 for each such failure or refusal."

B. *Rule*

Rule 43(a) of the Federal Rules of Civil Procedure provides in part:

> "* * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *."

C. *Regulations*

The regulations of the Department of Labor pertaining to the Longshoremen's and Harbor Workers' Compensation Act, 20 C. F. R. 01.11 *et seq.* in pertinent part provide:

> 1. "01.13 Forms.
>
> "Forms for use under the Longshoremen's Act are as follows:
>
> * * *
>
> "US-202 Employer's first report to Deputy Commissioner of accident or occupational disease."
>
> 2. "§ 31.3 Report by employer of injury or death.
>
> "Within 10 days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, or from the date the employer has knowledge of the injury or of any disease proximately caused by the employment or of death of an employee within the purview of said act, the employer shall send to the deputy commissioner for the compensation district in which occurrence took place, upon a form prescribed for that purpose by the Bureau, a report of such injury or disease, giving the particulars thereof. Where the injury or disease results in death,

the employer, immediately upon learning of the death, shall furnish on a form prescribed by the Bureau for that purpose, a supplemental report of the death. The employer shall, at the times and in the manner required, submit such additional reports in respect of the injury or death of his employee as the deputy commissioner may request."

3. "§ 31.23 Employer's record of injury or death.

"Every employer shall keep a record in respect of any injury to an employee. The record shall contain information of disease, other disability, or death in respect of such injury and shall be available to inspection by the Bureau or by any State authority."

Statement of the Case

Petitioner, an employee of respondent, brought an action under the Federal Employers' Liability Act for injuries allegedly sustained while he was operating a tractor at Pier 66, North River, New York, near midnight on December 24, 1956. Petitioner at that time was helping to unload a car float by driving a tractor hauling six flat trucks from a float over a gangplank to the pier and back over the gangplank to the float for reloading. Petitioner claims that he suffered a back injury on one of these return journeys (see Opinion Below, Petition, p. 11a).

The place where the accident occurred was a crucial issue at the trial and counsel for both petitioner and respondent are in agreement that if the accident took place on the gangplank leading from the pier to the float it occurred upon "navigable waters" and petitioner's sole remedy would be that provided by the Longshoremen's and Harbor Workers' Compensation Act (Petition, p. 2; *Pennsylvania R. Co.* v. *O'Rourke,* 344 U. S. 334 [1953]).

On December 26, 1956, after petitioner had returned to work, respondent reported the accident (Defendant's Exhibit EE) to the New York Office of the Department of Labor as required by Section 930(a) of the Longshoremen's

Act (33 U.S.C. § 930[a]) and retained a carbon copy thereof (Defendant's Exhibit CC) as required by Section 929 of the Longshoremen's Act (33 U.S.C. § 929) (see Opinion Below, Petition, pp. 11g-11h).

The form of report (Defendant's Exhibit EE) prescribed by the Department of Labor included one item reading "Place where injury occurred" and another, "Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard". In reply to the first item, respondent's freight agent wrote "Float No. 183 on north side of Pier 66 NR". In answer to the latter item, the report stated "He pulled a line of empty trailer trucks up the plank when his tractor stalled halfway up. Another operator pushed the line from behind with his tractor up the plank. In doing so, Taylor was jarred."*

Petitioner testified that while he was on the bulkhead of the pier and was approaching the gangplank he stopped about three feet from the gangplank to change gears and thereupon the last truck in his string of six was struck by a tractor driven by another employee of respondent, Arthur Green.

This was the only evidence at the trial which tended to show that the accident did not occur on the gangplank itself. In addition to the report to the Department of Labor and the carbon copy thereof (Defendant's Exhibits EE and CC, respectively) respondent introduced the following evidence to show that the injury occurred on the gangplank**:

> (1) The eyewitness testimony of Arthur Green, petitioner's co-worker, who said that he observed petitioner's tractor stalled on the gangplank and in trying to reach a position to push the flats attached to petitioner's tractor Green's tractor inad-

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* On page 5 of the Petition it is stated that the Labor Department report contained the language there quoted. Actually the language quoted in the Petition is from Defendant's Exhibit BB for Identification, an intra-company report which was not admitted in evidence.

** Petitioner is thus in error when he indicates that respondent's sole proof on this issue consisted of the Department of Labor report and the carbon copy thereof (see Petition, p. 4).

vertently struck petitioner's rear flat truck at an angle (Def. App.* pp. 12a-25a).

(2) The statement by petitioner to Dr. Falk, made on January 8, 1957, that the accident occurred on the gangplank (Def. App. pp. 2a-3a).

(3) Dr. Falk's treatment card (Defendant's Exhibit Z) recording plaintiff's statement that the accident occurred on the gangplank (Def. App. pp. 2a-6a, 34a).

In addition, the St. Clare's Hospital record (Defendant's Exhibit X), where petitioner was taken immediately after the accident, containing the history obtained at the emergency ward, had a statement that the accident occurred on the gangplank at Pier 66. While the hospital record was admitted, the Trial Court (erroneously, we believe) excluded the statement relating to the place of the accident on the ground that the hospital report was merely an "abstract" of the original hospital record (App.** p. 104a). The Trial Court also excluded (erroneously, we contended) respondent's intra-company report (Defendant's Exhibit BB for Identification), which the evidence established was made in the ordinary course of business (App. pp. 97a-100a), and this too indicated that the accident took place on the gangplank.

At the trial, petitioner's counsel conceded that the report to the Department of Labor (Defendant's Exhibit EE) and the carbon copy (Defendant's Exhibit CC) were both records made in the regular course of business. At the time of the offer of these documents, counsel for respondent suggested that both documents be marked, but the Trial Court ruled that it was necessary initially to mark only one of the statements, the carbon copy (Defendant's Exhibit CC), and that a stipulation could then cover the other document, the original report to the Department of

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* "Def. App." refers to the Appendix to Brief for Defendant-Appellee filed in the Court of Appeals.

** "App." refers to Petitioner's Appendix filed in the Court of Appeals.

Labor (Defendant's Exhibit EE). The following colloquy then took place before the jury (App. p. 102a):

> "The Clerk: Document marked for identification as Defendant's Exhibit CC.
>
> "The Court: Show it to your adversary. It's apparently subject to the same ruling. Not quite.
>
> "Mr. Fuchsberg: Same objection.
>
> "The Court: In other words, you don't raise any question of its being made in their course of business but as to its general admissibility?
>
> "Mr. Fuchsberg: Yes. I object to writing notes to one another.
>
> "The Court: No. You better take a look at that one. This is not an intra-company report. Look at the heading.
>
> "Mr. Fuchsberg: I saw it. I make the same objection."

While in the later argument before the Court counsel for petitioner did refer to *Palmer* v. *Hoffman* and some recent decisions of the Court of Appeals, he did not retract his concession that these two documents were made in the regular course of business, but, instead, concentrated his efforts upon attempting to convince the Trial Court that the reports lacked indicia of reliability (App. pp. 116a-124a).

At the trial petitioner's counsel did not object to the admission of the report to the Department of Labor (Defendant's Exhibit EE) on the ground that such a report was excluded by the language of Section 930(c) of the Longshoremen's Act. This objection was raised for the first time on the appeal to the Court of Appeals for the Second Circuit (see Opinion Below, Petition, p. 11l).

Argument

Petitioner contends that this Court should review the decision below because the Court below "misconstrued, misapplied and unduly restricted" this Court's decision in

Palmer v. *Hoffman*, 318 U. S. 109 (1943). He also contends that the decision below is in conflict with the decisions of the Courts of Appeals for the Sixth and Ninth Circuits, citing *Dilley* v. *Chesapeake & Ohio Railway Company*, 327 F. 2d 249 (6th Cir. 1964) and *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188 (9th Cir. 1957), cert. denied 356 U. S. 975 (1958).

Neither contention has any merit whatever. The decision below was made by an experienced court, well aware of the *Palmer* v. *Hoffman* doctrine, and offers no conflict with either that case or the *Dilley* and *Standard Oil* decisions.

a. The Palmer v. Hoffman doctrine is inapplicable.

In *Palmer* v. *Hoffman*, the excluded report was made by the engineer of the train (later deceased) who was directly involved in the accident and who made the statement obviously with the intent to exculpate himself and his employer, and this Court held that the trial court properly excluded the document which was offered under the Federal Business Records Act.

The report here in question (Defendant's Exhibit EE) was required to be made by the Longshoremen's Act, was not made by a participant who would naturally try to avoid liability, and the portion of the document objected to did not relate to the issue of negligence (*i.e., how* the accident occurred), but simply to *where* it took place.

The Court of Appeals for the Second Circuit stated that the report in question in this case was similar to that held admissible in *United States* v. *New York Foreign Trade Zone Operators*, 304 F. 2d 792 (2nd Cir. 1962). In discussing the nature of the report, the Court below said (Petition, pp. 11i-11j):

> "The statement in the Foreign Trade Zone case, as in this, had elements of both disadvantage and advantage to the entrant's employer. Both statements were admissions of liability for compensation. The report in Foreign Trade Zone afforded a basis

for recovery by the employer against a third person, 5 U. S. C. § 776, whereas the statement here afforded a basis for the employer's defending against suit under the FELA. The cases are similar also in that each entrant, unlike the engineer in Palmer v. Hoffman, had no personal involvement in the accident and, in all likelihood, no awareness of the manner in which his entry might work to the employer's advantage. The report here was made when, so far as the record shows, no one thought Taylor had suffered any serious injury*, and it can hardly be assumed that a freight agent would appreciate the witty diversity whereby the difference of a few feet in the place of an employee's injury would result in the imposition of a distinct legal regime. The B & O freight agent's report that Taylor's accident occurred on the gangplank, making the B & O thus liable to pay compensation under the Longshoremen's Act, is a far cry from Judge Frank's description of Palmer as a case 'where the person who makes the memorandum or report knows at the time of making it that he is very likely, in a probable law suit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability,' 129 F. 2d 976, 991 (2 Cir. 1942) (italics omitted). See Judge Clark's concurring opinion in the Foreign Trade Zone case, supra, 304 F. 2d at 799."

The Court of Appeals said (see Opinion Below, Petition, p. 11i) that the report here was also similar to those which it held admissible in two other cases, in one of which certiorari was denied by this Court: *Naylor* v. *Isthmian*

* In point of fact, petitioner returned to work on the first working day after the accident and worked for more than ten months thereafter. There is thus no basis for the statement in the Petition (p. 7) "that the report was here made for the purpose of future litigation."

S. S. Co., 187 F. 2d 538 (2nd Cir. 1951), and *Terrasi* v. *South Atlantic Lines*, 226 F. 2d 823 (2nd Cir. 1955), cert. denied 350 U. S. 988 (1956).

Furthermore, as we have seen (pp. 7-8, *supra*), at the trial, counsel for petitioner in effect conceded that the record in question was made in the regular course of business and his attack on the admissibility was directed at an attempt to show that the record did not bear the indicia of reliability.*

In addition, there is here involved not only the Federal Business Records Act but a similar New York State Act, former Section 374-a of the New York Civil Practice Act which was in effect at the time of trial (see p. 3, *supra*), and under Rule 43(a) of the Federal Rules of Civil Procedure the record was properly admitted under the New York Act, even if conceivably it were barred by the Federal Business Records Act (which we deny). This is made clear by a recent New York appellate ruling in *Bishin* v. *New York Central Railroad Company*, 20 A D 2d 921 (2nd Dept. 1964). In that case, shortly after the accident in question, the defendant railroad's conductor made a written report in the regular course of business which stated that warning signals had been given at the crossing where the accident occurred. This was an important issue in the case. The plaintiffs-respondents contended that the report was properly excluded under the *Palmer* v. *Hoffman* doctrine. In holding that the report should have been admitted, the Appellate Division, Second Department, declared (id. at 921-922):

> "*** Finally, it was error to exclude an employee's report of the railroad grade crossing accident solely on the ground that it was self-serving. The statute (CPLR 4518; former Civ. Prac. Act, § 374-a) renders admissible records made in the regular course of business; the statute makes no exception for records

* It should be noted that in his instructions to the jury the Trial Court here specifically pointed out to the jury that no one knew from what source the information appearing on the report to the Department of Labor was obtained and instructed the jury that hearsay evidence of this sort is "often less reliable than testimony in open court" (App. pp. 34a-35a).

which also happen to be self-serving. It has been observed that the self-serving aspect of a record does not preclude its admissibility under the statute but is merely a consideration affecting the weight to be given to it (*Publishers' Book Bindery* v. *Ziegelheim,* 184 Misc. 559)."

b. There is no conflict between the decision below and the decisions of the Sixth and Ninth Circuits.

In *Dilley* v. *Chesapeake & Ohio Railway Company, supra,* the Sixth Circuit held that a report by the railroad company's employee as to how (as distinguished from where) the accident occurred was not admissible as an admission on the part of the defendant railway company for the reason that the employee did not have authority to bind his employer. The statement there was similar to the one involved in *Palmer* v. *Hoffman* and was not required to be filed under any statute.

Standard Oil Company of California v. *Moore, supra,* was a treble damage antitrust action brought against seven major oil companies. The exhibits which the Ninth Circuit held to be inadmissible included memoranda, letters and reports dealing with pricing and marketing policies of oil companies other than those of the ones in which the writings were found and contained expressions of opinion or conclusions. See 251 F. 2d at 213-214. The Court also pointed out that the plaintiff had failed to prove that there was any systematic or routine procedure being followed in the preparation and filing of certain of the records (251 F. 2d at 215). Obviously, therefore, the excluded writings in the *Standard Oil Company* case have no resemblance to the record here involved.

Thus, there is no conflict whatever between the decision below and those of the Sixth and Ninth Circuits cited by petitioner.

c. The objection, first raised on appeal, that Section 930(c) of the Longshoremen's Act barred admission of the record is untenable.

Section 930(a) of the Longshoremen's Act provides that within ten days from the date of injury a report should be made to the Department of Labor. Section 930(c) provides that any report made under subdivision (a) shall not be evidence of any fact stated in such report "in any *proceeding*" with respect to the injury on account of which the report is made (emphasis supplied).

In the context of the Longshoremen's Act, it is evident that the word "proceeding" in this exclusionary clause refers to proceedings under the Longshoremen's Act and not to actions at law for damages.*

Where Congress has intended that a report should not be admitted in an action at law for damages it has clearly stated so. Thus, in Section 41 of Title 45 U.S.C. it is provided that no report of railroad accidents required under Section 38 of that Act shall be admitted as evidence or used for any purpose "in any *suit or action for damages* growing out of any matter mentioned in said report or investigation" (emphasis supplied). Similar language referring to "any suit or action for damages" appears in statutes relating to the inadmissibility of reports under the Boiler Inspection Act (45 U.S.C. § 32), reports made by motor carriers (49 U.S.C. § 320[f]) and reports of airplane accidents made to the Civil Aeronautics Board (49 U.S.C. § 1441[e]). Cf. *Palmer* v. *Hoffman, supra,* 318 U. S. at 114-115.

Thus, the fact that the Longshoremen's Act refers to "any proceeding" rather than "any suit or action for damages" clearly indicates that Congress was referring to compensation proceedings under that Act.

Section 929 of the Longshoremen's Act provides that every employer shall keep a record of any injury to an em-

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* Other sections of the Longshoremen's Act clearly indicate that the word "proceeding" used in the Act refers to a compensation proceeding. See 33 U.S.C. §§ 919(h), 923(b), 924, 926, 927(a) and (b).

ployee and the Act does not provide any limitation on the use of such record in "any proceeding" or in "any suit or action for damages". Thus, even if there were error in the admission of the report to the Department of Labor (Defendant's Exhibit EE) such error was harmless, since the carbon copy thereof (Defendant's Exhibit CC) was clearly admissible under the doctrine established by this Court in *St. Regis Paper Co.* v. *United States,* 368 U. S. 208 (1961), with respect to copies of census reports retained in a company's files.

The two contentions of respondent referred to above were noted but not passed upon by the Court of Appeals (see Opinion Below, Petition, pp. 11j-11k). The Court below, however, did uphold a third contention of respondent, namely, that petitioner's failure to make an objection at the trial upon the ground that Section 930(c) of the Longshoremen's Act barred admission of the record precluded him from raising it for the first time on appeal (see Opinion Below, Petition, p. 11l). The Court below was clearly correct both as a matter of general law as expressed by Wigmore and as a matter of federal law (ibid.).* It further stated (ibid.):

> "To allow an objection to evidence that should have been made and might well have been sustained at trial to be advanced for the first time on appeal produces a trial that would otherwise have been avoided; in these days of crowded calendars and congested courts, such a luxury can be permitted only in rare cases when necessary to prevent a clear miscarriage of justice. We have no conviction that that such is the case here; we think rather that the jury showed usual good sense in regarding Taylor's claim concerning the *locus* of the injury as

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* Petitioner cites 1 Wigmore, *Evidence* (Third Ed.) § 18, to the effect that if "there is no purpose at all for which the evidence could have been admissible" then an objection, though naming an untenable ground, will thereafter be effective. This, of course, obviously has no application to the report in question for it clearly had a purpose in tending to establish the place where the accident took place.

an afterthought. Furthermore, the party offering the evidence might have decided to forego it and rely on other testimony if he had been apprised of this added basis of vulnerability."

Conclusion

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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